

Date: 20020412
Docket: CAC 159286

NOVA SCOTIA COURT OF APPEAL
[Cite as: R. v. Assoun, 2002 NSCA 50]

BETWEEN:

GLENN EUGENE ASSOUN

Applicant/Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

DECISION

Counsel: Warren K. Zimmer for the applicant/appellant
Edward A. Gores for the respondent
Jane E. O'Neill for Nova Scotia Legal Aid

Application Heard: March 21, 2002

Decision Delivered: April 12, 2002

BEFORE THE HONOURABLE JUSTICE CROMWELL IN CHAMBERS

CROMWELL, J.A.: (in Chambers)

I. INTRODUCTION:

- [2] On September 17, 1999 Glenn Eugene Assoun was convicted of second degree murder. He was subsequently sentenced to imprisonment for life with no possibility of parole for 18.5 years. He filed an *in personam* notice of appeal of his conviction to this Court on October 15, 1999 and now applies for assignment of counsel pursuant to s. 684 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46.
- [3] Under s. 684, a judge of the Court may assign counsel to act on behalf of the accused where "... in the opinion of the ... judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance."

II. THE EVIDENCE:

- [4] Mr. Assoun supports his application with his own affidavit and that of Warren Zimmer, Barrister, who has assisted him in his attempts to obtain counsel for this appeal.
- [5] In his affidavit, Mr. Assoun relates that he was charged with the murder of Brenda LeAnne Way and arrested in 1998. At the time, he was living in Chilliwack, British Columbia with Dorothy Bersuk. Upon being returned to Halifax following his arrest, he applied for, and was granted, legal aid through the Nova Scotia Legal Aid Commission in May of 1998. He retained Donald Murray, Barrister, to represent him and Mr. Murray did so through the preliminary inquiry until Mr. Assoun discharged Mr. Murray as his counsel early in the trial.
- [6] Mr. Assoun deposes that he thereafter tried to retain Patrick Atherton, Barrister and Solicitor, to represent him but discovered at that time that he did not have sufficient money in the bank to do so. Consequently, he reapplied to Legal Aid in August of 1999, "near the start of my trial", as he puts it, but Legal Aid was refused as was an appeal from that denial.
- [7] Mr. Assoun deposes that at the time of his arrest in Chilliwack, British Columbia, he was receiving a disability payment from Sun Life of approximately \$1,475 per month plus CPP of approximately \$490 per month. The CPP deposits were by way of electronic credit memo and the Sun Life deposits were by way of cheques sent to the residence of Dorothy

- Bersuk and subsequently deposited by her in Mr. Assoun's account. He annexes banking records for 1998, 1999 and 2000 and deposes that from 1998 to late 1999 Dorothy Bersuk forged cheques on this account, which was not a joint account, taking almost all of the money in the account by means of these forged cheques.
- [8] Mr. Assoun further deposes that he was not aware that Dorothy Bersuk was systematically withdrawing funds from his account by way of these forged cheques and that his first indication that something was not right in his account came in June 1999. At that time, he attempted to retain Patrick Atherton and discovered that he did not have sufficient funds for a retainer. Attached as exhibits to Mr. Assoun's affidavit are copies of a large number of cheques payable to Dorothy Bersuk.
- [9] Mr. Assoun notes that he authorized Ms. Bersuk to pay a retainer to Patrick Atherton and that there is a cheque dated June 8th, 1999, for \$4,500 payable to Ms. Bersuk which Mr. Assoun believes she cashed for payment to Mr. Atherton. He goes on to depose that Mr. Atherton did not act for him as this amount was not sufficient to retain Mr. Atherton's services and that he believes the money was returned to Ms. Bersuk by Mr. Atherton but never redeposited to his account.
- [10] Mr. Assoun says that he became aware of the full extent of Dorothy Bersuk's fraud in late 1999 and arranged for his brother, Kevin Assoun, to close the account and open a new one. However, he states that Dorothy Bersuk was still able to make one last withdrawal on or about December 4th, 1999, before he was finally able to make arrangements with the bank to prevent her from accessing the account.
- [11] He deposes that his Sun Life disability payments of roughly \$1,500 per month ceased at the end of October of 2000 and that from November of 2000 to the present time his sole source of income outside of the penitentiary has been his CPP benefits of about \$533 per month. He earns a very small weekly wage for working in the penitentiary. He indicates that he has no other savings, stocks, bonds, property or investments that he can use to retain counsel and no other financial resources available to him to allow him to retain counsel for his appeal and "nowhere else to turn."
- [12] Mr. Assoun indicates in his affidavit that he reapplied to Legal Aid early in 2001 and was refused.
- [13] As mentioned earlier, a number of cheques are annexed to Mr. Assoun's affidavit. The cheques in the last group are dated in August of 1999. The banking records for 1999 and 2000 are also included. They show monthly

deposits of roughly \$2000 per month throughout this period until November 1st, 2000. The deposit for December of 1999 follows what Mr. Assoun describes as Dorothy Bersuk's last fraudulent withdrawal on December 4th, 1999. Thus, roughly \$24,000 was deposited to this account between the last of the withdrawal's by Ms. Bersuk in December of 1999 and the end of the Sun Life payments on November 1st, 2000.

- [14] Mr. Assoun deposes that throughout the year 2000 and to the present, his brother Kevin has had a Power of Attorney in relation to this account and "looks after it for me".
- [15] No information is provided by Mr. Assoun about what happened to the roughly \$24,000 deposited to this account between December 5, 1999 and November 1, 2000 or the roughly \$8000 deposited from November 1st, 2000 until the present. In other words, roughly \$32,000 of income is unaccounted for in Mr. Assoun's affidavit.
- [16] There is an affidavit before the Court sworn by Mr. Zimmer who has been assisting Mr. Assoun in connection with his attempts to obtain legal counsel for the appeal. Mr. Zimmer indicates that he was contacted by Kevin Assoun, Mr. Assoun's brother, in early May of 2000 with a request that he look at and consider providing legal advice to Mr. Assoun in relation to his pending appeal. Mr. Zimmer had also been approached by Glenn Assoun during the trial to provide advice to Mr. Assoun but Mr. Zimmer was unable to assist at that time. Mr. Zimmer deposes that he forwarded an application for Legal Aid on behalf of Mr. Assoun in early October of 2000, which application was denied in November of the same year. Mr. Zimmer refers to (but does not annex as exhibits) correspondence provided to him by Legal Aid indicating that Mr. Assoun had contacted Legal Aid on August 26th, 1999 to request additional Legal Aid services following Mr. Murray's discharge on June 4th and that such further assistance was denied by Legal Aid by letter dated August 27th. The denial of legal aid was appealed and the appeal was rejected on September 14th, 1999.
- [17] Mr. Zimmer indicates that he has reviewed portions of the transcript of the trial. He states that Mr. Assoun explained to the trial judge on June 18th, 1999, that he had made efforts to contact Legal Aid, that on August 27th Mr. Assoun rose to speak and was removed from the court room and that upon his return to the court room he renewed his request for a lawyer which was denied. Mr. Zimmer says that upon reading the transcript "it appears that [Mr. Assoun's] renewed effort to obtain Legal Aid services was not brought to the attention of the trial judge ...".

[18] As regards the merits of the appeal, Mr. Zimmer deposes as follows:

30 **THAT** on February 14, 2001, I spoke with Dana Giovannetti, Q.C., of the Public Prosecution Service (Appeals), who had been assigned the Assoun appeal;

31 **THAT** Mr. Giovannetti advised me that he had read approximately 1,700 of the 4,000 page transcript, and that it was Mr. Giovannetti's impression that the appeal was loaded with a large number of issues relating to the admissibility of evidence; these issues related to the probative value versus the prejudicial effect;

32 **THAT** Mr. Giovannetti advised me that the admissibility issues were complex and that the trial itself was a complex murder trial and that Mr. Assoun, in his opinion, required the assistance of counsel to effectively marshal the issues and arguments;

33 **THAT** Mr. Giovannetti further advised me that there were a large number of *voir dires* devoted to the admissibility of evidence and that there were a number of complex legal issues that went to the heart of the conviction and that Mr. Assoun would definitely need a lawyer to ensure that all of the issues would be properly considered;

34 **THAT** Mr. Giovannetti further advised me that the transcript was a difficult one to read because of the length and nature of the numerous discussions which were involved during the course of the trial;

35 **THAT** I further spoke to Mr. Giovannetti on June 11, 2001, and he advised that he has now read 3,984 pages and his opinion as referenced in paragraphs 31 to 34 remains unchanged; I read paragraphs 31 to 34 to him over the telephone to obtain agreement and they have not been altered from the original text as read;

[19] With respect to Mr. Assoun's ability to represent himself, Mr. Zimmer indicates that Mr. Assoun advises that he has a Grade 6 formal education and that he has attended trades school where he has received certificates in Industrial Installation and Heavy Equipment operating. Based on what Mr. Zimmer describes as his numerous and lengthy conversations with Mr. Assoun relating to the appeal, it is clear to Mr. Zimmer that Mr. Assoun is not competent to deal with the legal issues involved in the case and has no ability to recognize, research or argue points of law.

[20] Mr. Zimmer also sets out some of the issues in the appeal which, in his view, have merit.

- [21] No evidence was filed on behalf of the Attorney General who responded to the application and there was no request for cross-examination on these affidavits.
- [22] On the day before the hearing in Chambers, counsel for the Attorney General filed a brief and supporting authorities. One of the points strongly pressed in that brief was that Mr. Assoun's application should be dismissed because he had offered no evidence that he had been refused Legal Aid although qualified on financial grounds.
- [23] At the opening of the hearing in Chambers, Mr. Zimmer, with Mr. Gores' consent, filed two letters from Legal Aid. These letters set out additional information about Mr. Assoun's dealings with Legal Aid which I will now summarize.
- [24] As noted, on August 26, 1999, Mr. Assoun contacted Legal Aid to request further Legal Aid services. It appears from a review of the trial transcript, which I will discuss shortly, that apart from inquiries made by his girlfriend, this was the first contact by Mr. Assoun with Legal Aid following his discharge of Mr. Murray on June 4th. It also appears that there were other efforts over the summer by Mr. Assoun and/or his girlfriend to retain counsel privately.
- [25] Mr. Assoun's request to Legal Aid was denied on August 27 and Mr. Assoun appealed the denial. The appeal was refused on the basis that Mr. Assoun did not provide the Appeal Committee with a satisfactory explanation as to why Mr. Murray had been discharged.
- [26] As noted, Mr. Assoun's *in personam* notice of appeal was filed on October 15, 1999. In October of 2000, Mr. Zimmer, on Mr. Assoun's behalf, wrote to Legal Aid enclosing an application for Legal Aid Services. Over the next year, correspondence was exchanged between Mr. Zimmer and Legal Aid with a view to Legal Aid obtaining accurate information concerning Mr. Assoun's financial position including income and assets since his first application dated May 7, 1998. Ultimately, Legal Aid refused to provide further legal services. That decision includes the following statements:

...

In terms of Mr. Assoun's request for a reconsideration of his Legal Aid status, the position of the Commission is that Mr. Assoun is not financially eligible for receipt of Legal Aid services. It would appear that from May 7, 1998, being the date of Mr. Assoun's first application for Legal Aid, through to September 30,

2001, Mr. Assoun has received income from Sun Life of Canada and the Canada Pension Plan totaling \$64,779.00. From May 1998 through to September 30, 2001 Mr. Assoun has been incarcerated and presumably incurred no living expenses. In your letter of June 21, 2001 you advised that “Mr. Assoun is employed full time at the institution” and I would assume that this employment would be sufficient for purchases of personal toiletry items and canteen merchandise.

...

Mr. Assoun’s application for Legal Aid services dated May 7, 1998, when considered with the Sun Life of Canada correspondence dated February 23, 2001 and September 17, 2001 establishes that Mr. Assoun made a false statement or concealed information in the course of applying for Legal Aid services. Section 19 of the Legal Aid Act states that:

19 Legal aid may be refused, suspended or withdrawn, as the case may be, or a certificate cancelled with regard to any person otherwise eligible when that person, without sufficient reason,

(a) makes a false statement or conceals information in applying for Legal Aid.

The Commission, based upon the information gathered in the course of responding to your letter of October 6, 2000, has determined that Mr. Assoun has not provided credible information in the past concerning his financial status and that the information he is now bringing forward concerning his financial status is not persuasive and indeed is not accepted as being credible. The Commission takes the position that he has accumulated substantial funds and continues to receive income from the Canada Pension Plan such that he is in a financial position to pay the reasonable legal fees associated with his appeal from his own resources. Mr. Assoun has provided various explanations as to the dissipation of the funds accumulated since May 1998 but those explanations are not accepted by the Commission.

(emphasis added)

- [27] On the basis of this correspondence, I conclude that Mr. Assoun did not reveal his income of approximately \$2,000 per month at the time he applied for and obtained Legal Aid services in May of 1998. This fact is not addressed in his affidavit filed in these proceedings and no excuse, explanation or justification is advanced for this concealment of his financial affairs from Legal Aid. The letter also reveals that Legal Aid’s refusal of further services in September of 1999 was based on Mr. Assoun’s failure to

co-operate with the counsel whom he had retained with no mention that he was not financially qualified. In the absence of evidence to the contrary or any explanation from Mr. Assoun, I would draw the reasonable inference that Mr. Assoun's income was not revealed to Legal Aid in connection with his application for further services in September of 1999.

- [28] I should add, as Ms. O'Neill stated in her submissions before me, that this correspondence from Legal Aid was filed on the initiative and with the consent of Mr. Zimmer and Mr. Gores and was not placed before the Court at the instance of Legal Aid.
- [29] At the hearing before me, counsel indicated their agreement that it would be appropriate for me to review the trial transcript which has been filed. I have done so. As a result of my review, a letter was sent to counsel noting particular passages in the transcript and inviting submissions. I have had the benefit of further submissions from both Mr. Zimmer and Mr. Gores. As a result of my review of the transcript and these additional submissions, I would add the following to my statement of the facts.
- [30] As noted, Mr. Assoun obtained Legal Aid and retained Donald Murray as his counsel. Mr. Murray acted from May of 1998 through the preliminary inquiry in August of that year and into the Supreme Court trial until June 4th, 1999. It appears from my review of the transcript that pre-trial *voir direds* began in the Supreme Court on April 12, 1999 and continued over roughly 10 court days until June 1. The trial proper began on June 1 with arraignment and jury selection and almost immediately thereafter, another *voir dire* was held. The trial continued on June 3 and at the opening of proceedings on June 4, Mr. Assoun told the judge that he wished to discharge Mr. Murray and to represent himself. In relation to his discharge of Mr. Murray, Mr. Assoun said as follows:

MR. ASSOUN: Your Honour, I've been – I have done 14 months of time since I've been incarcerated. During this 14 months I've [inaudible due to distance from microphone] and I feel that there is some certain ways that he's been dishonest with me, and I know if I continue with Don Murray, I have no chance at trial of getting the truth. The Crown witnesses, some of them are professional criminals may have dealt with Crown attorneys before.

They've dealt with lawyers that are much more aggressive than Don Murray and they are trained to answer questions. They have no fear. And there's not much I can do about that. But I'm here in this courtroom. I'm going to be here for a month. My life depends on this.

My life depends on getting to the truth. And it will not get to the truth with Don Murray as my counsel and I see that. I see it in the way he cross-examines witnesses. There's so much that I can see that I really can't explain. I'm standing here right now talking to you shaking in my boots. I know these two men here. They're smart men, Crown attorney, and their job is to convict. I understand that.

...

MR. ASSOUN: ... And there's no way that I can get to the truth with Don Murray. I know if I continue to keep Don Murray, I have no chance at this trial. And I know if I represent myself against these two men here that I have a slim chance, and I mean "very" slim. But I'd rather take a slim chance than no chance at all.

I would like to represent myself in this trial. I pray that God is with me and all I want to do is get to the truth. And I've been telling the truth. I've been wrongfully imprisoned for 14 months now. And I think in Don Murray's heart he knows that. He's seen the pain and suffering that I've been going through for being accused of a vicious crime that I did not commit. Now all I'm saying here, Your Honour, is I feel I have more of a chance at least trying to defend myself in getting to the truth by myself. I've been reading statements over 14 months, at least the statements that I had.

Don Murray brought me out a whole bunch of disclosure a few months back and disclosure that I didn't know anything about, statements that I had originally, day one, I guess, around here.

Like, a lot of this is just letters and stuff. He brought me out extensive books, you know. And there's a lot of statements in them that I couldn't make out because of my eyesight, the small handwriting of the police officers and stuff. It wasn't legible to me. I told Mr. Murray that. He told me that he would get copies printed up, like typed, that I could make out which I never, ever did receive.

And then I had all this legal stuff and I had a chance to go through it on the weekend, which I could, over a period of weekends and then I had to give it all back to him. I didn't have a chance to, you know, really know what's in there. We had two voir dres. I wanted to call some witnesses to the voir dire and Mr. Murray didn't seem to want to do that, ma'am. And I heard you ask him there the other day if he had any witnesses and he just stood up and said, No, I haven't. I heard one of the Crown attorneys ask him the same thing.

Back at the preliminary inquiry, if I would have called, basically, certain witnesses to the preliminary inquiry, I believe with all my heart, ma'am, this – I wouldn't be standing here today. This would not have went to trial. That's my belief. And I'm not going to get into that right now because I feel I have to defend myself. So I'm not going to get into that, but I will.

But, as it stands right now, I know I have no chance with Mr. Murray at all. I have 12 people here in the jury who don't know me. They know what the Crown presents to them. They don't have statements to me. They don't know what's in these statements. There's certain things got picked out of the statements by the Crown and it's presented to a jury. They don't know what the whole – the whole thing that's in the statement, how people write their statements that's given to the police.

I know for a fact that Crown witnesses have been taken into rooms here, sat down and gone over their statements and times have been changed, dates, and what-have-you to suit the crime. And that's not right, ma'am. It's not right at all.

THE COURT: I guess the –

MR. ASSOUN: Excuse me, ma'am, please. I have about five people that write KGB statements because – and the Court is always saying, well, consistency and inconsistency. You know, it's a big thing with the Court. But I have five people who are consistently lying against me. For whatever reason, I don't know. I can guess, but I'm not positive. I do know the truth.

THE COURT: I guess what I'm trying to determine, and I guess you've already said this, Mr. Assoun, is that you are – you're releasing Mr. Murray. You no longer want him to represent you. Is that what you're saying?

MR. ASSOUN: Yes, ma'am.

THE COURT: And that you wish to continue this trial representing yourself starting right this minute. Is that what you're saying?

MR. ASSOUN: Well, I guess I have no choice, Your Honour. I'm not an educated man by no means especially sitting towards these two gentlemen here. I know I have a slight chance. I mean "very slight." But at least it's a chance. I have no chance with this man.

(emphasis added)

(Appeal Book, Volume IV, Page 1261, line 8 to Page 1265, line 17)

- [31] Mr. Assoun then advised the Court that he wished time to seek other counsel. The matter was adjourned until the following Monday, June 7th. On that date, the status of Legal Aid and Mr. Assoun's attempts to retain new counsel were discussed. Mr. Assoun testified briefly about his education and training and his attempts to find counsel. He also said this:

MR. ASSOUN: Well, I was going to explore one more avenue, Your Honour, if you don't mind. And that was through my family. I was going to appeal to them. This second lawyer that I did talk to, he didn't turn me down flat out no.

THE COURT: Oh, I see. Okay.

MR. ASSOUN: There's a possibility there and I just need some time to talk to my family and see what their situation is. Other than going through Legal Aid, if I can help it –

THE COURT: How long would it take you to determine from your family whether or not you are able to raise the funds to pay a private lawyer? How much time would you need for that?

MR. ASSOUN: To speak to my family members, it would probably take a couple of days to get an answer one way or the other, if they can assist me or they can't. I told their second lawyer that I called that I would come up here and talk to you and see if I could take it from there.

(emphasis added) (Appeal Book, Volume IV, Page 1344, lines 7 - 22)

- [32] The trial was adjourned to Wednesday, June 9 at which time Mr. J. P. Atherton, Barrister, appeared on behalf of Mr. Assoun to request an adjournment, that the jury be discharged and that the trial start again with a new jury in September. The judge initially decided to adjourn until September but to continue the trial at that time with the same jury. Thereafter, it became clear that Mr. Atherton could not make the necessary commitment to the proposed revised schedule for trial. After consultation with Mr. Assoun, Mr. Atherton advised the Court that Mr. Assoun would be representing himself at the trial and requested on his behalf an adjournment to prepare himself.
- [33] Mr. Atherton appeared otherwise willing to act. He confirmed in the following exchange with Crown counsel that he was fully retained subject to the trial schedule:

MR. FETTERLY: I also understand that Mr. Atherton is fully retained and willing to be on record in these proceedings, not for just this application, although what was sent yesterday would appear to be pertaining to this application. I understand from speaking with him that he is retained and acting, and expects to act at the trial if it's adjourned.

THE COURT: My understanding yesterday was as Mr. Fetterly has said; however, your brief has said – has referred to the contrary. So I take it - -

MR. ATHERTON My Lady, yes, that is correct, in the sense that if I get a one-week adjournment, I am not prepared to act. I simply can't do it. And I don't think any lawyer in this city could get up to speed on a trial of this magnitude and do a competent job. And that's what I meant. Yes, I am retained, assuming I get sufficient time to properly prepare.

(emphasis added)

(Appeal Book, Volume IV, Page 1373, line 17 to Page 1374, line 8)

- [34] The trial transcript in this regard is at marked variance from Mr. Assoun's affidavit filed before me. In that affidavit, he deposes that he attempted to retain Mr. Atherton in June of 1999 but discovered at that time that he did not have sufficient funds for a retainer. However, in the trial transcript, Mr. Atherton confirmed to the Court that he was fully retained and willing to act subject only to scheduling.
- [35] In response to my raising this part of the transcript with counsel, Mr. Zimmer indicates that he has spoken to Mr. Assoun who advises that Mr. Atherton required a retainer of \$10,000 but Mr. Assoun could only provide \$4,500. However, Mr. Atherton agreed to act upon Mr. Assoun assigning his disability pension income to Mr. Atherton until such time as his account was paid.
- [36] With Mr. Atherton out of the picture, the trial judge adjourned the trial with the jury to return on August 23.
- [37] Mr. Assoun's efforts to retain counsel were also discussed with the Court on August 23. Mr. Assoun said as follows:

MR. ASSOUN: ... My girlfriend contacted Legal Aid. She talked to some administrator over there in Legal Aid in Dartmouth, I forget his name right now, but if I heard it again, I would recognize it, and he - - he was starting to give her a big spiel. He was talking about my case. He didn't even know who was on the other side of the phone line. He said, oh, yes, we're real interested in that case and we've been in court and we've been following that. Well, why? What is his interest in this case? You know, foolish talk like that. And if Mr. Assoun wants

to apply for Legal Aid, he'd better have a good damn reason why he fired his lawyer. Well, I did have a good reason why I fired my lawyer.

THE COURT: And did you speak to Legal Aid? Did you apply to Legal Aid?

MR. ASSOUN: No, my girlfriend applied and she had been talking to him and she got a negative response from the individual, whoever he was, I can't remember his name, but I would recognize it if I heard it.

THE COURT: But did you make a written application or your girlfriend just called and made some general inquiries?

MR. ASSOUN: She made general inquiries and she was talking to him about that I need a lawyer and all this stuff and he was quite negative and he was going on about my case to her and stuff like that. And, like I said, that didn't make sense and it wasn't a positive thing that I would [inaudible due to Court and Mr. Assoun talking at once].

THE COURT: And you didn't follow up with it?

MR. ASSOUN: It wasn't a positive thing that I would get another certificate because it just all looked negative from what she has told me.

THE COURT: Based on one con - - one telephone conversation with someone whose name you don't recall at Dartmouth Legal Aid?

MR. ASSOUN: Based on what she told me, ma'am.
(emphasis added)

(Appeal Book, Volume V, Page 1628, line 8 to Page 1629, Line 17)

- [38] The exchange on August 23 is described in Mr. Zimmer's affidavit as Mr. Assoun explaining to Justice Hood that he had made efforts to contact Legal Aid and Mr. Zimmer, erroneously, places the exchange on June 18.
- [39] There were further discussions of legal representation on August 25 when the following exchange occurred:

MR. ASSOUN: Well, I'm going to raise a couple more issues that I've raised at the first of the week. As I just explained to you, I thought that I could present myself that way to get to the truth with these people. Obviously I can't make them tell the truth. I can't go up there and twist their arm and say, You tell the truth, because it's not going to happen. But I thought that this was the way that I could cross-examine them and testify to get to the truth. But I see it don't work

that way now. But I also see now - - I know I need a lawyer. And I'm asking you one more time, with all due respect, to give me an adjournment for six months to give me a lawyer to do this properly. Because this is only an illusion of a fair trial. It's just an illusion. That's all it is. Because there's nothing fair about it, Your Honour. Nothing in the way of fairness is here in this courtroom. I know - -

THE COURT: We've been through - -

MR. ASSOUN: - - I can prove my innocence.

THE COURT: We've been through this in June and you were given an opportunity to prepare yourself. You were at one point - - very early on said that you were going to represent yourself. I was the one who said to you, Why don't you take the weekend and think about whether you wish to do this, opt to seek counsel about whether or not you should represent yourself. And then you came back on the following Monday and said, No, I would like time to get a lawyer. We adjourned then again for 48 hours to see if you could find someone who could represent you with respect to the issues that were before the court at that time, which was as I recall the - - actually I'm not going to say which issues they were, because Mr. Atherton was here and did represent you briefly. Then it became apparent that he was not going to be able, for whatever reason, to continue to represent you. And we adjourned from the 9th of June until the 23rd of August to allow you time to get a lawyer. Crown, as I said yesterday, made available to you a Legal Aid application form. You told me that you did not complete it, that you had someone on your behalf speak to Legal Aid, I would say on an informal basis. You made no further application for a Legal Aid lawyer. You indicated at one point before the court that you thought you could come up with enough money to retain a lawyer. And now you come back here on the 23rd of August and say, I don't have a lawyer. Now I want time to get a lawyer. Well, you've had time to get a lawyer and we're going to continue. And I've said that. You've had your opportunity to get a lawyer and you didn't use it.

MR. ASSOUN I tried to get a lawyer. My girlfriend called every lawyer in these towns and they all came up with basically the same terms.

(emphasis added)

(Appeal Book, Volume VI, Page 2000, Line 11 to Page 2002, Line 12)

- [40] It is apparent from Mr. Zimmer's additional submission that the person referred to as Mr. Assoun's girlfriend in these passages is Dorothy Bersuk. It appears, therefore, that while Mr. Assoun swears in his affidavit that Ms. Bersuk was defrauding him by forging cheques on his account and that he first became aware that there was a problem with the account in early June

of 1999, Ms. Bersuk was in communication with, and attempting to assist, Mr. Assoun throughout the summer of 1999.

- [41] The trial continued to verdict on September 17. Sentencing took place in late 1999 at which point Mr. Assoun was represented by Mr. D. Beveridge, Barrister. There is nothing in the material originally filed about how Mr. Beveridge's appearance was funded, but it is a reasonable inference that he was privately retained. In his additional submissions, Mr. Zimmer advises that Mr. Beveridge was paid \$4,000 which was funded by another brother of Mr. Assoun, David.

III. ANALYSIS:

- [42] As noted, under s. 684 of the **Criminal Code**, a judge of the Court of Appeal is given the discretion to assign counsel where it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.
- [43] The first inquiry, therefore, is whether it appears to be in the interests of the administration of justice that Mr. Assoun have legal assistance for the purpose of preparing and presenting his appeal. This involves consideration of numerous factors including the merit of the appeal, its complexity, the ability of the appellant to effectively present his or her appeal without the assistance of a lawyer and the capacity of the court to properly decide the appeal without the assistance of counsel.
- [44] In my view it is abundantly clear that it would be in the interests of justice that Mr. Assoun have legal assistance. As set out in Mr. Zimmer's affidavit, Crown counsel assigned to respond to the appeal has indicated, following his review of most of the 4000 page transcript, that this was a complex murder trial, "loaded" with a large number of issues relating to the admissibility of evidence, that there were a large number of *voir dire*s devoted to the admissibility of evidence and that there are a number of complex legal issues that go to the heart of the conviction. I would add that Nova Scotia Legal Aid, so far as the record discloses, has never suggested that assistance has been refused on the basis that the appeal lacks merit. Crown counsel and Mr. Zimmer both opine that Mr. Assoun requires the assistance of counsel to effectively marshal the issues and arguments. I have no doubt that they are correct; Mr. Assoun, with limited formal education and some trade training is not well equipped to represent himself on an appeal of this nature.

- [45] The serious question for decision, therefore, relates to the second condition set out in s. 684, that is, whether Mr. Assoun has met the burden of satisfying me that he “... has not sufficient means to obtain legal assistance.”
- [46] In this case, one of the reasons for refusal of legal aid is that the Commission has concluded that Mr. Assoun is not financially eligible for receipt of Legal Aid services.
- [47] As Bateman, J.A. pointed out in **R. v. Innocente** (2000), 188 N.S.R. (2d) 308; N.S.J. No. 347 (Q.L.)(N.S.C.A.), in such a situation, the principles set out in **R. v. Grenkow** (1994), 127 N.S.R. (2d) 355; N.S.J. No. 26 (Q.L.) (N.S.C.A. Chambers) are of limited relevance as **Grenkow** was not concerned with a dispute about financial ability to retain counsel.
- [48] It was held in **R. v. Rowbotham et al** (1988), 41 C.C.C. (3d) 1 (Ont. C.A.) at 69, in the context of a **Charter** application for appointment of counsel at trial, that the finding of the Legal Aid authorities on the question of financial means is entitled to great respect. In my view, this is also the case on applications under s. 684. Legal Aid’s decision will often be based on material that could only come before the Court if the applicant waives any claim for privilege over information supplied to Legal Aid or to counsel assisting on the s. 684 application. Moreover, as a number of cases have pointed out, the primary obligation to assist those who require counsel, but who lack the means to retain counsel, rests with Legal Aid and the Court’s power to appoint counsel should be read together with and in light of that obligation: see for example, **Grenkow, supra**, **R. v. Bailey** (2001), 195 N.S.R. (2d) 190 (N.S.C.A. Chambers) at para. 12 and **R. v. Johal** (1998), 127 C.C.C.(3d) 273 (B.C.C.A. Chambers) at para 24.
- [49] The power to assign counsel is discretionary; s. 684 states that the court of appeal or a judge may assign counsel. In exercising that discretion, the judge ought to take into account the appropriate degree of deference owed to Legal Aid’s decision to refuse state-funded counsel on the grounds of financial ineligibility.
- [50] However, in my view, Legal Aid’s determination on the issue of financial eligibility is not, and cannot be, conclusive of the issue under section 684 of whether the applicant lacks sufficient means to obtain legal assistance for the appeal. The Court considering the assignment of counsel is not sitting on appeal from the Legal Aid decision and must make its own assessment of the relevant criteria on the record before the Court. There will be circumstances in which a judge, after examination of the means of the applicant, will be

satisfied that the applicant does not have the means to obtain legal assistance.

- [51] In my view, the discretion to assign counsel under s. 684 should be exercised with special caution in the case of an applicant who has concealed income and misled Legal Aid concerning his or her financial ability to retain counsel. The discretion should generally not be exercised in favour of such an applicant unless he or she satisfies the Court that he or she has made full and candid disclosure, subject to proper claims of privilege, of all financial resources and means available to the applicant. Failing such disclosure, only rarely could the court be convinced that the applicant “has not sufficient means to obtain...” the assistance of counsel.
- [52] The charge against Mr. Assoun was laid in March of 1998. He was arrested in British Columbia, where he then resided with Dorothy Bersuk, and brought to Nova Scotia. He sought, and was granted, Nova Scotia Legal Aid in May of 1998. He did not disclose at that time that he had been and continued to be in receipt of disability insurance payments of roughly \$1500 per month through Sun Life of Canada. He, therefore, made a false statement or concealed information in the course of applying for Legal Aid services.
- [53] Mr. Assoun does not dispute that this is so and offers no excuse or justification. Although Legal Aid advised Mr. Zimmer of its position on this matter in October of 2001, there is not a word about this in Mr. Assoun’s affidavit sworn on March 7, 2002 apart from acknowledgement that he was receiving the disability payments at the time of his arrest in the spring of 1998.
- [54] Reviewing all of the material which is before me, I am not satisfied that Mr. Assoun has made full and candid disclosure of his financial affairs, for the following reasons:
1. Mr. Assoun’s affidavit does not disclose, explain or offer any excuse for his failure to disclose his income at the time of his successful application for legal aid in May of 1998.
 2. Mr. Assoun’s affidavit in relation to his dealings with Mr. Atherton is at variance with the representations made in open court by Mr. Atherton during the trial. As noted, Mr. Assoun’s affidavit asserts that Mr. Assoun lacked sufficient money to retain Mr. Atherton whereas at trial Mr. Atherton confirmed to the Court that he had been fully retained subject only to a suitable trial schedule being arranged. The additional submissions filed by Mr. Zimmer in response to the

invitation from the Court in effect confirm that the version of why Mr. Atherton did not act given by Mr. Assoun in his affidavit was, at best, a half truth.

3. Mr. Assoun swears in his affidavit that he knew in June of 1999 that he lacked sufficient funds to retain counsel but it appears that, apart from some inquiries made on his behalf by his girlfriend, he did not seek further legal assistance from Legal Aid until August 26. It further appears from the trial transcript that he persisted over the summer months in attempting to retain counsel privately.
4. There is no disclosure as to whether Mr. Assoun drew his disability income to the attention of Legal Aid when he reapplied in August of 1999. The fact that Legal Aid does not appear to have commented on that income in its decision refusing to provide services at that time supports an inference that the income was not disclosed.
5. Mr. Assoun swears that by early June of 1999 (the time he was dealing with Mr. Atherton) he had his first indication that “something was not right” with his bank account. He maintains, however, and without explanation, that he did not become aware of the “full extent” of what he refers to as “Dorothy Bersuk’s fraud” until late 1999 even though it is clear from the trial transcript and Mr. Zimmer’s post-hearing submissions that Ms. Bersuk was in communication with and purporting to assist Mr. Assoun over the summer of 1999.
6. Mr. Assoun swears in his affidavit that Ms. Bersuk made her last fraudulent withdrawal from his account in early December of 1999. His disability income continued until the end of October of 2000. There is no evidence from Mr. Assoun as to what happened to the roughly \$24,000 that he received from CPP disability and Sun Life disability over that period, or of the income received between then and now.
7. There is no sworn information about the basis of the termination of the disability payments in October of 2000. That termination roughly coincided with his re-application to Legal Aid for legal services for the appeal.
8. Mr. Assoun indicated to the trial judge that, with a couple of days adjournment, he might be able to obtain assistance from his family to retain a lawyer. Two days later, Mr. Atherton appeared for trial, apparently fully retained subject to scheduling. It appears from Mr. Zimmer’s affidavit that it was Mr. Assoun’s brother who approached

him to assist Mr. Assoun both during the trial and afterward in connection with the appeal. Mr. Beveridge was privately retained for the sentencing. Mr. Assoun's brother, Kevin, has held the power of attorney on the bank account since late 1999, but as noted, there is no disclosure of where any of the money deposited to the account since then has gone. Apart from a broad statement in Mr. Assoun's affidavit that he has no other financial resources available to him to allow him to retain counsel for his appeal and no where else to turn, there is no indication that he has made any specific inquiries.

- [55] Mr. Assoun obtained legal services from Legal Aid as a result of false statements or concealment in relation to his income. His affidavit filed in support of his application before me contains what could only, with considerable charity, be described as half truths. He makes no attempt to account for significant sums of money which have been paid to him since the date of his conviction. In a word, he has failed to make complete and candid disclosure of his financial situation. I am not persuaded that he lacks the means to retain counsel. The application for assignment of counsel is, therefore, dismissed.

Cromwell, J.A.